

**REMARKS**

**I. INTRODUCTION**

Claims 1, 8 and 10 have been amended. Support for the amendment can be found in at least ¶ [0006] of the published specification. Thus, claims 1-10 remain pending in the present application. No new matter has been added. In light of the above amendments and the following remarks, Applicants respectfully submit that all presently pending claims are in condition for allowance.

**II. THE 35 U.S.C. § 101 REJECTION SHOULD BE WITHDRAWN**

Claims 8-10 stand rejected under 35 U.S.C. § 101 for failing to fall within one of the four statutory categories of invention. Specifically, the Examiner asserts that the claims can be reasonably construed as software only embodiments, which is considered non-statutory under 35 U.S.C. 101. *See* 9/22/0 Office Action, pp. 3-4. Applicant reiterates that in ¶ [0028] of the published specification it is stated that, “[t]he invention can be implemented by means of hardware comprising several distinct elements, and by means of a suitably programmed computer. In a device claim enumerating several means, several of these means can be embodied by one and the same items of hardware.” The argument that the specification on page 10, lines 15-24 illustrates that the systems and encoders may be implemented in software and that the claims can be reasonable construed as software only embodiments is unfounded as that portion of the specification (cited above as ¶ [0028] of the published application) teaches that the invention can be implemented by “means of *hardware*...and by means of a *suitably programmed computer*.” Claims 8-10 are written in means plus function language as allowed by 35 U.S.C. § 112, paragraph 6. As described above, the specification provides an example of a structure (a computer) that can execute the functionality recited. Applicants respectfully submit that software alone can never perform any functionality without the structure of a computing device executing the software. Thus, it is respectfully submitted that claims 8 and 10 are tied to another statutory class. Accordingly, the withdrawal of the § 101 rejection of claims 8-10 is respectfully requested.

**III. THE 35 U.S.C. § 102(b) REJECTION SHOULD BE WITHDRAWN**

Claims 1-5, 8 and 10 sand rejected under 35 U.S.C. § 102(b) for being anticipated by Tsutsui et al. (U.S. Patent No. 5,717,821) (hereinafter “Tsutsui2”).

Claim 1 recites, “[a] method of encoding an audio signal by representing at least part of said audio signal by a plurality of sinusoids, the method comprising the steps of: performing, by a computer, an analysis of a first segment of said audio signal; selecting, by the computer, candidate sinusoids based on said analysis; defining, by the computer, for at least one of the candidate sinusoids a local frequency band around a frequency of said at least one candidate sinusoid; combining, by the computer, amplitudes of frequency components within said local frequency band from which at least one of the candidate sinusoids within said local frequency band is excluded; and selecting, by the computer, said candidate sinusoid as a selected sinusoid in dependence of the combination of amplitudes *without regard to the at least one of the candidate sinusoids within said local frequency band that is excluded.*”

As asserted by the Examiner, “all the claim requires is that the amplitudes are combined excluding a candidate sinusoid, it does not specifically state or imply that later the combination cannot be made including the candidate sinusoid.” See 9/22/09 Office Action, p. 3. Applicants respectfully submit that in light of the amendment to claim 1, the claim does recite that the later the combination cannot be made including the candidate sinusoid. Since Tsutsui2 utilizes the entire ratio X/Y in step S8, where variable Y includes the candidate sinusoid, Tsutsui2 fails to teach or suggest selecting, by the computer, said candidate sinusoid as a selected sinusoid in dependence of the combination of amplitudes *without regard to the at least one of the candidate sinusoids within said local frequency band that is excluded*, as recited in claim 1. Thus, it is respectfully submitted that claim 1 and its dependent claims 2-5 are allowable over Tsutsui2.

Claims 8 and 10 recite limitation that are substantially similar to those in claim 1. Thus, Applicants respectfully submit that claims 8 is also allowable over Tsutsui2 for at least the foregoing reasons presented with regards to claim 1.

**IV. THE 35 U.S.C. § 103(a) REJECTIONS SHOULD BE WITHDRAWN**

Claims 6, 7 and 9 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Tsutsui2 in view of U.S. Patent No. 5,054,072 to McAulay et al.

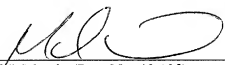
Applicants respectfully submit that McAulay does not cure the above-described deficiencies of the Tsutsui2 with respect to claims 1 and 8. Because claims 6 and 7 depend on and, therefore, include all the limitations of claim 1, it is respectfully submitted that these claims are also allowable for at least the same reasons given above with respect to claim 1. Because claim 9 depends on and, therefore, includes all the limitations of claim 8, it is respectfully submitted that this claim is also allowable for at least the same reasons above with respect to claim 8.

**CONCLUSION**

In light of the foregoing, the Applicant respectfully submits that all of the pending claims are in condition for allowance. All issues raised by the Examiner having been addressed, an early and favorable action on the merits is earnestly solicited.

Respectfully submitted,

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